

**DEPARTMENT OF ENVIRONMENTAL QUALITY
AGENCY POLICY STATEMENT NO. 1-2006**

SUBJECT: REGULATORY GUIDANCE DEVELOPMENT

REFERENCE: §2.2-40001 of the Code of Virginia

EFFECTIVE DATE: **same as signature date**

Summary:

This guidance was developed to address the first action plan in DEQ's Strategic Priorities, 2010, which is to issue regulations and implementation guidance at the same time. In addition, the Permit Efficiency Study recommended improvements to the format and utility of agency program guidance.

These steps have been developed to ensure the successful implementation of each regulation. Prior to initiating a regulatory action, the agency will consider guidance. If circumstances do not allow the guidance (or a plan for guidance) to be developed by the time the regulation is effective, the agency staff will at least be aware of the regulatory action and that guidance will soon follow.

Electronic Copy:

An electronic copy of this guidance is available on DEQ's website at <http://www.deq.virginia.gov/>

Contact Information:

Please contact Karen Sismour at (804) 698-4421 or kjsismour@deq.virginia.gov with any questions regarding the application of this guidance.

REGULATORY GUIDANCE DEVELOPMENT

I. Introduction:

The Department of Environmental Quality's "Strategic Priorities, 2010" identifies the long-term goals of the agency. One of these goals is to improve program capabilities by developing programs that are more efficient. One of the methods identified to garner this efficiency within the agency is to "issue regulations and implementation guidance at the same time." Also, the Permit Efficiency Study conducted in 2005 recommended improvements to the format and utility of agency program guidance.

The purpose of this document is to assist DEQ staff to:

- determine if guidance is necessary for a particular regulatory action,
- create a guidance development plan as a regulatory action is being contemplated, including regional participation, roles and responsibilities, and timeframes, and
- standardize the manner and format in which guidance is prepared.

By using this outline, guidance development will become part of the agency's standard regulatory development process.

II. Background:

All media programs develop guidance for a variety of reasons. Finding common ground regarding the rationale for developing guidance from program to program proves difficult at best. However, universally, guidance is developed to assure that programs meet the intended goal and function in a consistent manner. Often, guidance is developed after a problem or inconsistency is identified. Guidance cannot, however, create legal obligations beyond those required by existing law or regulation. Because guidance is required to achieve clear and consistent program objectives, guidance should be available to program staff and the regulated community before a new regulation becomes effective. However, in some cases, where regulations have been in place for some time, guidance may still be needed when problems or inconsistencies emerge.

In order to identify potential problems that may arise when a new regulation is issued or when an existing regulation is modified, communication between the various affected program areas is essential. If a new regulation has the potential to impact multiple program areas or if a regulation has the potential to have a significant impact on the regulated community, the regulation should be developed with the assistance of a project team that will develop any implementation guidance.

The goal is to prepare the guidance before the regulation becomes effective. Guidance may also be needed when implementing new legislation. The ideal timeframe during the regulatory process for guidance development varies based on the regulation that the guidance is intended to support. The source of the new regulation (federal or state requirement) can also affect the optimum timeframe for the development of guidance, as well as the need for guidance. The development of guidance will ultimately become an integral part of the development of regulations; however, the development of guidance must serve the timetable of the regulatory process, not vice-versa. Regulations will be written as clearly as possible, to strive for no guidance necessary; however, since regulations need not be encumbered by overly technical details or explanations, guidance is often needed to help interpret their applicability and use. In addition, guidance may be needed to outline and detail internal procedures that are not appropriate for inclusion in regulations.

This guidance was developed by a team of central office regulation and guidance developers and regional staff. This issue is addressed in two earlier documents and is expanded upon here: 11/16/98 Roles of Regional and Central Office, known as the 5 C's memo, and 7/20/00 Collaboration Process.

III. Definitions

"Division Director" means the director of the Air Division, Water Quality Division, Water Resources Division or Waste Division, as applicable.

"Guidance" means any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations (§2.2-40001 of the Code of Virginia).

"NOIRA" means the Notice of Intended Regulatory Action. NOIRA and other stages of regulatory development are explained on the Town Hall website, Guide to Virginia's Regulatory Process, at: <http://www.townhall.state.va.us/dpbpages/apaintro.cfm>

"Plan" means the guidance development plan explained in IV.B.

"Team Leader" means the individual tasked with the development of implementation guidance. In some cases, the team leader and the regulation writer may be the same person.

"Project Team" means a workgroup of DEQ staff assigned to work with the team leader to develop implementation guidance. The project team is made up of the individuals whose programs may be impacted by the regulation. It may also include members of the regulated community.

"Regulation Manager" means the manager overseeing the development of the regulation.

"Regulation Writer" means the individual tasked with the development of the regulation. In some cases, the regulation writer may function as the team leader.

IV. Procedure for Developing Guidance

A. Prior to Regulatory Action

As staff uses regulations and encounter issues and concerns, they should send their concerns to the appropriate Regulation Manager. The Regulation Manager (or Division Director Designee) will solicit input from impacted staff, prior to the NOIRA stage if possible. Staff participation will be solicited on regulatory actions, regardless of the need for a guidance document. The standard two-week minimum review time will be used, unless the Regulation Manager justifies and the Division Director approves a shorter timeframe.

B. Regulatory Action and Guidance Development Plan

Prior to initiating a regulatory action, the Regulation Manager (with assistance from other division staff) will prepare a guidance development plan (Plan) along with the NOIRA Approval Package to include the following information:

1. the content of the rulemaking (new regulation, change in law, etc)
2. the rulemaking schedule
3. the program areas potentially impacted
4. the number and types of facilities potentially impacted
5. any special issues or priorities associated with the regulation
6. whether the development of guidance is needed
7. the timeframe for guidance development
8. whether a project team is needed to develop guidance
9. a team leader and suggested team members (either individuals or position types or to be determined after plan is approved)
10. the process for training staff on the regulation and guidance
11. the timeframe to revisit the guidance (suggest 1-2 years after implementation).

Time for Plan Development: The Regulation Manager may need to work with impacted program managers on some of these items. If time permits, the Plan will be fully developed prior to the NOIRA stage. If the NOIRA must proceed prior to Plan development, then the Regulation Manager must justify the need and receive approval from the Division Director to proceed with the NOIRA, and the Plan can be developed during the regulatory process. If the regulatory action does not involve a NOIRA stage, then the plan can be a simple statement of the content of the rulemaking and any other applicable items. The key is to have the Regulation Manager consider each item above before the regulatory action is started.

Time for Guidance Development: While setting the timeframe for guidance development, keep in mind the goal is to issue regulations and guidance at the same time. In some instances, the appropriate time to review the regulatory changes and develop guidance will be after a proposed regulatory change has been published for comment. In some circumstances, it may be best to begin the guidance development one month prior to the final regulation going to the Board. If the regulation is expected to be controversial, then the Plan can explain the circumstances, and state that the guidance will be developed as soon as possible following final Board Action (within 6 months). Note that guidance cannot be finalized until after the Board has taken final action on a regulation as there may be changes to procedures as a result of public comment or Board action. The goal remains to provide staff with the proper tools to implement the regulation when the regulation is effective.

The Regulation Manager will submit the Plan to the Division Director. The Division Director will notify the Executive Management Team of the regulatory action and solicit input on the Plan, including any management or policy issues associated with the guidance or regulation and project team interest. Then the Division Director will revise the Plan as necessary and approve it.

C. Assembling a Project Team

Suggested steps for assembling a project team are provided below:

1. The Regulation Manager (or Division Director Designee) is responsible for assembling the project team.
2. The Team Leader will solicit project team participants from the regulation writers, guidance developers, and program areas impacted (permit writers, inspectors, etc.). The Regulation Writer should be on the project team. Close coordination and communication between the Team Leader and Regulation Writer will be maintained throughout the guidance development process.
3. Regional participation in the development of guidance is essential if the regulation is to be implemented at the regional level.
4. If the participatory approach is used in the regulatory development process, the Team Leader, along with other project team members, may participate in the regulation development. The Team Leader and/or other team members should be on the Technical Advisory Committee (TAC).
5. The Division Director will notify the Project Team members and their supervisors as to their membership on the project team.

D. Developing Guidance

Recommended items to consider in the development of guidance include:

1. The Project Team will determine the type of guidance that is needed to implement the regulation. Guidance may include checklists, submission instructions, boilerplates, frequently asked questions, etc.
2. The guidance should provide a synopsis and chronology of any existing guidance on this regulation or specific subject area and the intent of the updates provided herein.
3. The Project Team will coordinate with EPA and other agencies, as appropriate. The team will consider the guidance needs of DEQ staff, the regulated community, and citizens. The team may post draft versions on the web for regulated community and citizen input.
4. The Team Leader will continue to serve as the point of contact for the Project Team and will coordinate the development of guidance by holding meetings and monitoring the progress. The Team Leader will also ensure that comments are solicited from applicable program areas as well as all impacted program managers and staff. The standard two-week minimum review time will be used, unless the Team Leader justifies and the Division Director approves a shorter timeframe.
5. The program managers will be responsible for obtaining staff input regarding the documents and will coordinate responses to the Team Leader as applicable.
6. The Team Leader will advise the Regulation Manager/Division Director of any conflicts or project team performance issues. The Regulation Manager/Division Director will resolve any disputes brought forward during the development of the guidance.
7. The Project Team will prepare a response to comments with the rationale for the approach chosen to ensure staff comments are addressed.
8. After the guidance document is completed, it will be forwarded to the Division Director for approval. Final guidance will be posted on the web.
9. A trial period may be appropriate to field test guidance or it may be appropriate to have a few program staff conduct pilot application of the guidance to specific situations to identify whether or not it is appropriate and effective for meeting program goals.
10. New guidance should be revisited 1-2 years after issuance. Each guidance should routinely be reviewed every 5 years for effectiveness, the need for revision, and/or the removal of any outdated guidance by the unit that developed the guidance.

V. Attachments

Guidance Template - The recommended format for guidance development.

This policy is approved on the following date:

David K. Paylor

David K. Paylor
Director

4/17/2006

Date

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: [Air, Water Quality, Water Resources, Waste] Guidance Memo No. ##
TITLE OF GUIDANCE

To: [Regional Program Managers, Office Directors, Program Staff, etc]

From: [Division Director]
[Air, Water Quality, Water Resources, Waste] Division Director

Date: date

Copies: [Regional Directors, Deputy Regional Directors, etc.]

Summary:

Give an executive summary of the guidance, including the purpose and the statutory or regulatory provisions that are being interpreted. The goal is to keep this cover memo to one page.

Electronic Copy:

An electronic copy of this guidance is available on DEQ's website at
<http://www.deq.virginia.gov/>_____.

Contact Information:

Please contact [DEQ staff at (804) 698-xxxx or xxxxx@deq.virginia.gov with any questions regarding the application of this guidance.

Disclaimer: [include as appropriate, usually for external guidance]

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

TITLE OF GUIDANCE

1. Introduction – State why the guidance is needed.
2. Background - Provide a complete description of the situation that the guidance is intended to address. Provide concrete information, and cite examples of areas that have been problems in the past or what situations exist that require clarification to be provided. Please do not include the names of specific facilities or owners in guidance.
3. Authority - Cite the basis in law and regulation for the guidance and/or the law or regulation that is being interpreted. This may not be necessary for some internal procedures.
4. Definitions - Provide a list of definitions that will be used and the source of the definition. Cite the law or regulation on which the definition is based, or the rationale for the definition provided.
5. Guidance - The guidance should provide specific information on how the agency interprets or applies certain provisions and/or specific examples of what people can do to meet our regulatory expectations. Remember that guidance cannot be used to impose new obligations or requirements on regulated facilities, but is used to assist in interpreting or applying existing provisions. Clearly lay out roles and responsibilities of DEQ staff, any timeframes involved, and any expectations.
6. Additional Information as attachments or web links.